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In the

Supreme Court of the United States

October Term, 1931.

No. [redacted] /

The Port Rate-Relation Case.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

REBUTTAL BRIEF ON BEHALF OF APPELLANTS

THOMAS J. FREEMAN,
T. D. GRESHAM,
ESMOND PHELPS,
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R. E. MILLING, JR.,
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INDEX.

Page

Appellants do not contend that this Court should substitute its judgment for that of the Commission as to findings supported by substantial evidence 1

Rates attributable to competition between routes can not be measured by the Inflexible yardstick of distance 2

The relation between rates from territory not covered by the orders sought to be enjoined is immaterial in so far as the issues in this case are concerned 5

Mere equality of rates can not force a diversion of tonnage 6

Appellees ignore the interests and rights of interior shippers 7

Appellees advance no argument that will support their construction of Section 3 of the Act. . . . 8

The Ashland Fire Brick Case 10

This case is not moot as to rates on grain. 10

Action of the Commission in equalizing rates via competing routes in the Consolidated Southwestern Cases shows that the only foundation for the orders here sought to be enjoined is in matters unrelated to transportation 11

Page

The Commission itself recognizes that Texas & Pacific System costs have no probative value herein 16

The Congress has not directed that traffic be arbitrarily diverted from one port to another.. 17

The limits of port equalization are properly determined by the variant costs of the service rather than by fixed mileage restrictions.... 18

Conclusion 19

CASES CITED.

Maritime Asso., Boston Chamber of Commerce v. A. A. Ry. Co., 95 Inters. Com. Rep. 539.... 4

Consolidated Southwestern Cases, 123 Inters. Com. Rep. 203 .....4, 11, 15

Duluth Chamber of Commerce v. C. & N. W. Ry. Co., 156 Inters. Com. Rep. 156..... 10

Interstate Commerce Commission v. Alabama Midland Ry. Co., 74 Fed. 715, 724..... 19

Import Rate Case, 162 U. S. 197 21

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REBUTTAL BRIEF ON BEHALF OF APPELLANTS

APPELLANTS DO NOT CONTEND THAT THIS COURT SHOULD SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION AS TO FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In each of the briefs filed by appellees emphasis is laid on the proposition that this Court will not set

aside a finding of fact made by the Commission that is supported by substantial evidence. That such is the law is fully recognized by the appellants, and nowhere in their respective briefs have they asked that this Court substitute its judgment for that of the Commission on any finding of fact that is supported by substantial evidence.

It is true that appellants have to a greater or less extent made reference to some of the testimony and other evidence of record, but an analysis of the evidentiary data so made use of will readily disclose that same were used for one or another of the following purposes:

(a) To illustrate the meaning or significance of some abstract statement or finding of fact (*e. g.*, see pages 220-23 of the Texas & Pacific brief);

(b) To demonstrate, on the one hand, that certain findings of fact made by the Commission are arbitrary and useless, in that they are in disregard of and contrary to the unrefuted evidence of record (*e. g.*, see pages 202-14 of the Texas & Pacific brief);

(c) To show, on the contrary, that in part the findings of the Commission are based upon specious and speculative testimony that is in turn founded upon unsubstantiated hypotheses and is contradicted by facts established of record (*e. g.*, see pages 165-73 of the Texas & Pacific brief).

RATES ATTRIBUTABLE TO COMPETITION BETWEEN ROUTES CAN NOT BE MEASURED BY THE INFLEXIBLE YARDSTICK OF DISTANCE.

Independently of such illustrative references to the evidence of record, though, appellants adhere to the

proposition laid down in their briefs to the effect that the Commission's ultimate finding or conclusion that the maintenance of the rail rates to and from New Orleans on a parity with the corresponding rates to and from the Texas ports gives rise to undue preference and prejudice is contrary to its other findings of fact, such as that the traffic is handled to and from New Orleans on such rates at a profit, that wonderful strides were made in the growth and development of the Texas ports during the years before its differential order became effective, and that the traffic in question is highly competitive and is free to move through one port or another as the shipper may desire or his interests may dictate. We therefore say that the factor of distance, which necessarily plays a most important part in the determination of maximum reasonable rates, is of minor significance in determining whether rates made under the stress of competition give rise to undue preference or prejudice.

Scattered throughout the Commission brief* (see pages 24, 31, 32, 33, 36, 51, 52, and 71), and to some extent in the Galveston brief (pages 24, 26, and 43) and the Santa Fe brief (pages 30 and 37), the argument is apparently postulated upon the tacit assumption that the equalized rates heretofore maintained by the appellant carriers are inherently discriminatory and unduly prejudicial, and that therefore the Commission's orders herein prohibiting such port equalization are valid and should be sustained. This, however, is to ignore entirely the fact that the very

*For convenience, in the ensuing discussion we shall refer to the brief of the United States and the Interstate Commerce Commission as the Commission brief, to the brief of the Galveston Chamber of Commerce and its associated interests as the Galveston brief, and to the brief of the Appellee Railroad Companies as the Santa Fe brief.

issue to be determined is whether such equalized rates on this highly competitive traffic can and do in fact and in law give rise to undue preference and prejudice such as is prohibited by section 3 of the Interstate Commerce Act. At page 387 of its 1927 report herein (R. 3416), the Commission itself recognizes the principle that the carriers may lawfully depart from the transportation standard in making rates perforce of the compelling influence of competition, saying in part that, "even where injury is shown, the preference or prejudice may, within limits, be justified by competition," citing *Maritime Asso., Boston Chamber of Commerce*, v. *A. A. Ry. Co.*, 95 Inters. Comm. Rep. 539.

In the Commission brief (pages 41 and 73) an effort is made to draw an analogy between the maintenance of a rate parity as to foreign and coastwise traffic and a corresponding equalization of the rates to New Orleans on domestic traffic for longer hauls than to Galveston. Such an attempted analogy, however, is founded upon faulty and unsound premises. In the case of domestic traffic, that is, traffic produced or consumed at the ports, there is lacking the competitive element that is present in respect of the foreign and coastwise traffic herein under review. The latter has a common origin and destination, and the other does not.

As stated above, the determination or fixation of maximum reasonable rates, based upon differences in distance, affords absolutely no proper criterion by which to determine the lawfulness of rates established under the stress of competitive influences. For example, in *Consolidated Southwestern Cases*, 123 Inters. Com. Rep. 203, cited in each of the briefs of

appellees, which brought about a comprehensive readjustment of the class and commodity rates in the Southwest, the Commission prescribed under the provisions of Section 3 numerous *maximum* class and commodity rates designed to remove prejudices and inconsistencies found to exist in the southwestern rate structure. However, with respect to the so-called "outbound" commodities, that is, commodities produced within the Southwest and shipped to northern and eastern markets in competition with like commodities produced in other parts of the country, the Commission made it a point to state at page 406 of its report that nothing therein "is to be understood as disapproving the continuance of relatively lower interstate rates of the character indicated," subject to certain limitations thereupon outlined.

THE RELATION BETWEEN RATES FROM TERRITORY NOT COVERED BY THE ORDERS SOUGHT TO BE ENJOINED IS IMMATERIAL IN SO FAR AS THE ISSUES IN THIS CASE ARE CONCERNED.

Another respect in which the argument embodied in the Commission brief is similarly based upon a misconception of the situation has to do with the references on pages 42, 52, and 71-72 thereof to the existence of lower rates to New Orleans than to Galveston where the distances are less to New Orleans. A like inference is found on page 3 of the Galveston brief. While this may be true in many instances, it may not be correct in others, but in any event it is entirely beside the point. The Commission's orders do not, as stated in the Galveston brief, leave the rates to New Orleans lower than the rates to the Texas ports from all points in the interior where the

distances to New Orleans are less than to the Texas ports, nor do they leave the rates to New Orleans the same as the rates to the Texas ports where the distances are the same. The Commission's orders do not even purport to fix the relation of the rates to the respective ports in controversy, except where the distances to New Orleans exceed those to Galveston by more than 25 per cent.

In point of fact, the carriers serving Galveston are entirely free, if they so desire, to maintain Galveston on a rate parity with New Orleans as to this foreign and coastwise traffic, even though the distances to Galveston might be *more* than 25 per cent in excess of the distances to New Orleans, and we submit that the only reason that Galveston has not been accorded the benefit of such rate parity as to points contiguous to New Orleans is the fact that the carriers serving the latter port have not elected to do so. Thus, as noted in the Mackley report (R. 66), a witness for one of the Galveston lines testified that he did not think they could hope to get any business out of the Southeast and he would not waste his money publishing a tariff from Mississippi into Galveston. Be that as it may, though, *there is no artificial obstacle to hinder the Galveston lines from equalizing the rates to Galveston with those to New Orleans*, such as the Commission has seen fit to impose herein with respect to the equalization of New Orleans with Galveston.

MERE EQUALITY OF RATES CAN NOT FORCE A DIVERSION OF TONNAGE.

At pages 22-23 of the Galveston brief it is asserted that the equalization of New Orleans with Galveston

has resulted in the diversion to New Orleans of traffic which otherwise would move through the Texas ports. But how can it be that an *equality of rates* has brought about a diversion of the traffic? Where the rates are equal, the traffic is as free to move through the Texas ports as through New Orleans. In reality, the diversion of the traffic to Galveston instead of to New Orleans is what is accomplished in consequence the higher rates to New Orleans than to Galveston which the Commission is undertaking to enforce by its orders herein assailed.

Appellees ignore the interests and rights of interior shippers.

Pages 15 to 18 of the Galveston brief are devoted to a discussion of "Distances to the Respective Ports." In that connection the question naturally arises as to who is entitled to reap the benefit of geographical location, available rail facilities, and the like, the shipper in the interior who bears the freight burden or the man at the port who levies toll on the traffic as it passes over the wharves. We again revert to the following concluding passage (R. 3431-32) in the dissenting opinion of former Commissioner Hall:

> "In finding undue prejudice to the Texas Ports we are unwittingly reversing the remedial purpose of the statute. The ports, like the railroads, are there to serve the shipper, not the shipper to serve the ports or the railroads."

This is strictly in keeping with the following altruistic declarations made by counsel for the Texas ports, Mr. Fulbright, upon oral argument before Di-

vision 2 of the Commission in 1924 (I. C. C. Rec. 2141, certified to this Court as an original exhibit):

> "These ports are not established for the benefit of the people who live at the ports. They are established to be the commercial gateways of the United States. They are established for the benefit of those people who live in the interior and are producing or consuming commodities that move through those ports, * * *"

APPELLEES ADVANCE NO ARGUMENT THAT WILL SUPPORT THEIR CONSTRUCTION OF SECTION 3 OF THE ACT.

Constant reference is made in the respective briefs of appellees (see Commission brief pages 25, 74, 76, 54; Galveston brief, pp. 51, 53-57; Santa Fe brief, p 22) to the participation by the New Orleans lines in rates to the Texas ports. This is altogether without legal significance, however, inasmuch as participation in such rates is compulsory under paragraph (4) of section 1 of the Interstate Commerce Act, which, so far as here material, reads as follows:

> "(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, * * *."

Moreover, so far as intrastate traffic between the interior points in Texas and the Texas ports is concerned, the carriers are required to publish and observe the rates prescribed by the Railroad Commission of Texas. Where there is no fixed intention to

export same at the time of movement, shipments may lawfully be made from interior points in Texas to the Texas ports on the intrastate rates, and in many instances they are in fact the same as the published export rates.

But, even were the New Orleans carriers to withdraw their participation in export and import commodity rates to and from the Texas ports, as suggested by appellees, the applicable published class rates would automatically apply to the traffic in question, and the New Orleans carriers would thereupon be obliged to maintain the rates to New Orleans differentially above such class rates to avoid being held in violation of the Commission's orders herein.

Furthermore, class rates aside, the cancellation by the Texas & Pacific of its participation in joint export, import and coastwise rates would still leave combination through rates in effect and *the orders sought to be enjoined would run against said combination rates.* The New Orleans port lines, however, are in no better position to reduce the combination rates to Galveston so as to accomplish the prescribed differentials than they are to reduce the existing joint rates to Galveston. In neither case do the New Orleans lines have that measure of control over the aggregate rates to Galveston which would permit them to comply with the orders by alternative means.

At page 76 of the Commission's brief this is said:

> "Appellants contend that the method of removing undue preference and prejudice, whether by raising the rates to the preferred locality or by lowering the rates to the prejudiced locality, must be left to the discretion of the carriers, * * *"

Such is not our contention. Rather, as we took pains to point out in the footnote on page 95 of the brief for the New Orleans Joint Traffic Bureau, et al., our contention, which is stated in two parts, is: (1) Where the order is alternative in form, as it is here, the alternative must be a real one, and (2) to issue any valid mandatory order under Section 3, the circumstances must be such that an alternative order *could* have been issued, and, if issued, could have been complied with by alternative means.

The Ashland Fire Brick Case.

On page 33 of the Santa Fe brief, *Duluth Chamber of Commerce* v. *C. & N. W. Ry. Co.*, 156 Inters. Com. Rep. 156, is cited as authority for the overturning of the *Ashland Fire Brick case* doctrine, of which we are complaining in this case. We respectfully urge that the Court examine the dissenting opinions in the *Duluth Chamber of Commerce case* for a clear and sound analysis of the reasons which support the *Ashland Fire Brick case* doctrine.

This Case is Not Moot as to Rates on Grain.

In the Galveston brief, beginning at page 9, it is contended that this case is moot, in so far as rates on grain are concerned, because in *Docket 17000, part 8*, the Commission limited the scope of the differential territory The point is not well taken. The orders sought to be joined, after being slightly narrowed in the subsequent case, are still outstanding and control the rates in which we are interested. Their validity must necessarily be determined in this case.

ACTION OF THE COMMISSION IN EQUALIZING RATES VIA COMPETING ROUTES IN THE CONSOLIDATED SOUTHWESTERN CASES SHOWS THAT THE ONLY FOUNDATION FOR THE ORDERS HERE SOUGHT TO BE ENJOINED IS IN MATTERS UNRELATED TO TRANSPORTATION.

In each of the briefs of appellees it is asserted that the Court may not properly take into consideration the Commission's fourth-section orders in passing upon the lawfulness of the alleged infraction of the third section resulting from the maintenance of New Orleans on a rate parity with the Texas ports. At least in so far as the rates on grain and on cottonseed cake, meal, and oil are concerned, such contention is untenable. The findings as to fourth-section relief were made an integral part of the Commission's reports in the cases wherein such rates were prescribed, and constitute a definite expression as to the extent to which such rates may be lawfully applied over indirect lines *under the transportation standard.*

Irrespective of that, however, let us now see what is the attitude of the Commission in other cases with respect to the equalization of the rates via indirect lines *under the third section.* Reference is made in the respective briefs of the appellees herein, as previously stated, to the comprehensive decision of the Commission in *Consolidated Southwestern cases, supra.* Indeed, in the Santa Fe brief it is twice asserted (pages 44-45 and 64) that the carriers appellant herein have not challenged the validity of the Commission's order in that proceeding as being contrary to Sec. 3 of the Interstate Commerce Act, or in violation of the due process clause of the Constitution.

Counsel, however, have not been entirely frank

with the Court as to what was done by the Commission in that proceeding. It is true, as they state, that the Commission there prescribed numerous maximum class and commodity rates which (Galveston brief, p. 38) are so "tied up by numerous section-3 findings," as to have the practical effect of making them minimum rates. We have previously seen, nevertheless, that the Commission specifically authorized the carriers to publish and maintain lower competitive rates on the "outbound" commodities moving from the Southwest. And under the caption of "The Fourth Section," at page 403 of its initial report in that proceeding, the Commission in part said: "Our findings and order will be understood to require establishment of the prescribed rates over the direct routes," following which the suggestion was made that the carriers might apply for such fourth-section relief as they might require in connection with the rates prescribed. This was accordingly done, and temporary fourth-section relief permitting the operation of such rates over indirect routes has been granted under Fourth Section Order No. 9600. The application for permanent fourth-section relief is yet pending before the Commission.

Aside from that, though, the Commission has permitted departures from such *maximum* rates under Sec. 3 in the case of competitive traffic. For instance, between points in what is known as official territory and the Southwest, the Commission prescribed specific maximum rates which differ according as the application thereof is via the different gateways, such as St. Louis, Memphis, Vicksburg, and New Orleans, the lower rates, generally speaking, being made to apply

via the shortest route, which usually is St. Louis. In a petition for reconsideration the carriers sought permission to apply the lowest of such rates via the longer routes operating through the other higher-rated gateways. In the report of the Commission on reconsideration in that proceeding, 139 Inters. Com. Rep. 535, 584-85, this feature of the case was commented upon, the Commission saying:

> "In a general way all the rates are based upon distance, and the lowest rate will usually be obtained through the gateway through which the most direct route passes. Consequently, between given points in the defined territories and given points in the Southwest or in Kansas-Missouri territory the lowest rates will in some instances be determined through one gateway and in other instances through another. *Defendants operating through higher-rated gateways are authorized to meet the rates prescribed through the lower-rated gateways.*" (Emphasis ours.)

To illustrate the effect of the permission so granted by the Commission to the carriers to publish competitive rates via indirect routes, let us take the first-class rate of $2.92 prescribed to apply between Pittsburgh and Dallas via the St. Louis gateway, and the higher first-class rate of $3.52 prescribed to apply between the same points via the longer route through New Orleans, as set out in the following statement:

FROM PITTSBURGH TO DALLAS*

Via St. Louis,

Rate—$2.92,

composed of arbitrary of 82 cents to St. Louis, shown as applicable to Group 16 on page 458 in Appendix 14, added to a rate from St. Louis to Dallas of $2.10 destined Group 16, as shown in Appendix 19 on page 479. Dallas is in Group 16, as shown on page 445 in Appendix 11. The short route distance via St. Louis in 1260 miles via P&WV, Pittsburgh Junction, Ohio, W&LE, Bowerston, Ohio, PRR, Newark, Ohio, B&O, Columbus, Ohio, Big Four, Osborne, Ohio, Erie RR., Dayton, Ohio, PRR, East St. Louis, Ill., Sou. Ry., St. Louis, Mo., StL-SF, Vinita, Okla., M-K-T., Denison, Tex., T&NO.

Via New Orleans,

Rate—$3.52,

as shown in Appendix 17 on page 473, Dallas being named in Group 307, per Appendix 11 on page 441. The short route distance to New Orleans plus the T&P distance from New Orleans to Dallas is 1633 miles via P&WV, Pittsburgh Junction, Ohio, W&LE, Bowerston, Ohio, PRR, Newark, Ohio, B&O, East Norwood, Ohio, PRR, Cincinnati, Ohio, CNO&TP, Chattanooga, Tenn., AGS, York, Ala., Sou. Ry. Meridian, Miss., NO&NE, New Orleans, La., T&P.

Via Chicago.

No specific rates were prescribed through the Chicago gateway and under fourth-section relief the lowest rate was made applicable through Chicago. The short route distance to Chicago plus the Santa Fe distance to Dallas is 1545 miles via P&LE, Youngstown, Ohio, B&O, Kent, Ohio, Erie R. R., Akron, Ohio, AC&Y, New London, Ohio, Big Four, Greenwich, Ohio, B&O, Chicago, Ill., AT&SF-GC&SF.

Incidentally, it might be stated that the Texas & Pacific, for instance, in conjunction with the Missouri Pacific and lines operating east of St. Louis, participates in the above rate of $2.92 applied through St. Louis, and at the same time also maintains with other

*While the distances recited are not of record, they have been carefully computed and we believe they are correct. The routes via which they apply are set out so that they may be checked. If appellees question the accuracy thereof, we are willing to accept any correction they may have to offer.

connections the same rate for the longer haul through the New Orleans gateway. If Liverpool, say, be substituted for Pittsburgh and the Galveston gateway be used instead of the rate-making route via St. Louis, the arbitrary nature of the Commission's refusal to permit an equalization of the New Orleans route with that via Galveston is readily manifest.

Similar illustrations might be given with respect to the prescribed rates between the numerous other points listed in the appendices to the Commission's report in said proceeding. From the instance cited above, however, it will be noted that the carriers have been permitted to equalize the rate prescribed via the St. Louis gateway over a route via New Orleans that is approximately 30 per cent greater. In the case of the rates between Cleveland or Indianapolis and Dallas, for example, the disparities in both rates and distance through the New Orleans gateway would be even greater. Obviously, in view of the latitude so authorized by the Commission under Sec. 3 in the application via competitive routes of the *maximum* class and commodity rates prescribed in said *Consolidated Southwestern Cases,* there was no occasion for the New Orleans carriers to assail the orders of the Commission therein. Had the Commission been as liberal-minded as that in the case herein under review, this foreign and coastwise traffic would likewise have had no rate differentials imposed upon it, and there hence would have been no occasion for these appellants to petition a Court of Equity for relief from the orders in question.

THE COMMISSION ITSELF RECOGNIZES THAT TEXAS & PACIFIC SYSTEM COSTS HAVE NO PROBATIVE VALUE HEREIN.

On pages 48-49 of the Commission brief there are quoted from the Commission's 1927 report certain statistical computations made by the Commission from which it drew the deduction that it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans as it does over the Santa Fe or the Missouri-Kansas-Texas to Galveston. The cost comparisons so made, though, were based upon the *system* operating costs of the respective carriers. However, as pointed out on page 21 of the Galveston brief, in its 1929 report the Commission refers to a showing made by the Texas & Pacific (Exhibit A-65, R. 1038) that its earnings per mile of line are equal to or greater than those of said Texas port lines, "from which it argues that the differences in cost in favor of the Texas lines are attributable to the fact that a larger proportion of its tonnage consists of high-grade traffic." (See, as to this, R. 3196-97.) Thereupon, the Commission added (R. 3450):

> "The commodities or groups of commodities upon which differentials were prescribed in the previous report, however, *can hardly be classed as high-grade traffic*, and the record does not show that the earnings per mile of line on the commodities here concerned are any greater, or even as great, on the Texas & Pacific than on the Texas lines." (Emphasis ours.)

It is to be presumed, of course, in the absence of evidence to the contrary, that the cost of handling,

as well as the earnings, is less in the case of low-grade traffic than in the case of high-grade traffic. We thus see that in the foregoing statement the Commission has itself discredited the average *system* costs of the Texas & Pacific as reflecting any fair or proper criteria by which to gauge the cost of handling the foreign and coastwise traffic with which this proceeding is concerned, and hence, by its own admission, any computations made from such *system* costs are wholly without evidentiary value.

THE CONGRESS HAS NOT DIRECTED THAT TRAFFIC BE ARBITRARILY DIVERTED FROM ONE PORT TO ANOTHER.

At page 24 of the Galveston brief there is quoted the following expression taken from the Commission's 1925 report (R. 3360), which is immediately followed by the observations made by the Commission therein with respect to Sec. 500 of the Transportation Act, 1920, and Sec. 8 of the Merchant Marine Act, 1920, as quoted on page 24 of said brief:

> "We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

To the extent that the Texas ports are built up as a result of the enforcement of the differential rate adjustment prescribed herein by the Commission, it necessarily will be at the expense of New Orleans. We do not believe that it was the purpose or intent

of the Congress that the Commission should establish an arbitrary rate adjustment designed to tear down one port or group of ports in order to promote and develop another port or group of ports.

THE LIMITS OF PORT EQUALIZATION ARE PROPERLY DETERMINED BY THE VARIANT COSTS OF THE SERVICE RATHER THAN BY FIXED MILEAGE RESTRICTIONS.

At pages 10 to 12 of the Galveston brief, reference is made to the testimony of several witnesses to the effect that in their opinion rate equalization should not be permitted as to traffic moving to and from interior points within specified distance limits of the ports. Undoubetdly, there are limits beyond which equalization of the rates should not extend, but such limits are to be determined by the cost of the service—the transportation standard,—and not by any arbitrary or fixed distance limitations. Such was the tenor of the testimony of the Illinois Central witness, Mr. Jones (R. 476, 1571, 1573), who said in part that "The matter of whether the business could be handled at a profit would be the governing consideration." Witness Rausch, of the Missouri Pacific, also cited by said appellees, qualified his testimony as to the 300 or 400 mile limit by saying (R. 1129) he did not mean that there should be no equalization within those distances, but that it should be left to each carrier to determine.

Other witnesses who testified that the carriers should be permitted to exercise their managerial discretion in the matter, and to fix the limit accordingly as they could handle the traffic profitably, were as follows: Mr. Lynch (R. 767); Mr. Lallande (R. 1148-

50); Mr. Reed (R. 1158-59); Mr. Giessow (R. 1318-19); Mr. Burke (R. 1385, 1387); Mr. Johnston (R. 2456). Mr. Reed and Mr. Burke represented the port interests at Pensacola and Charleston, respectively. The position of these witnesses is strictly in accord with the following declaration of the court in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 724:

> "The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business."

The foregoing likewise affords an apt answer to the comparison of a 100-mile haul to a 2,000-mile haul offered as an "extreme" example on page 14 of the Santa Fe brief.

CONCLUSION.

Appellees ignore altogether—

(a) The long line of decisions of this Court holding that the law does not invest the Commission with the exercise of managerial supervision over the carriers, but that they are at liberty to determine and establish their own rates and rate policies in the exercise of managerial discretion so long as the latter are not unlawful and do not run contrary to public policy.

(b) The repeated decisions of this Court that disparities between the rates and/or services that are

fused in the white-hot crucible of competition and competitive influences do not give rise to undue preference or prejudice such as is condemned by Sec. 3 of the Interstate Commerce Act.

Appellees assume without proving—

(a) That the mere existence of an equality of rates on competitive traffic for the longer hauls to and from New Orleans than to and from the Texas ports gives rise to undue preference and prejudice, insisting that the ports must be treated as the origin and destination of the traffic, as the case may be, and ignoring entirely the ocean haul beyond the ports.

(b) That the equalized rates assailed before the Commission are discriminatory. That is the issue to be determined. They should demonstrate how and why the Texas ports are or can be hurt by the maintenance via a rival port or ports of the same *through* rates that they have (and that is all that appellants are seeking the right to do).

Appellees do not deny—

(a) That there was a remarkable, if not phenomenal, development of the Texas ports prior to the establishment of the prescribed differential rate adjustment herein under review. This was accomplished during the existence of a policy of equalization of New Orleans with the Texas ports on the part of appellant carriers and a number of their connections.

(b) That the orders of the Commission herein under review have created undue preferences and

prejudices at interior points, as illustrated, for instance, at pages 220-23 of the Texas & Pacific brief.

(c) That, in prescribing differentials on some commodities and not on others, and in fixing differentials as to the former on some traffic different from those on other traffic, the Commission was influenced by considerations other than the transportation standard. If, measured by the transportation standard, it is permissible for the carriers to maintain New Orleans on a rate parity with the Texas ports as to petroleum oil and blackstrap molasses, then by the same token it is incompetent for the Commission to require the carriers to maintain rates on other foreign and coastwise traffic differentially higher to and from New Orleans than to and from the Texas ports.

(d) That the Commission substituted a decision of its own, holding that in passing upon the lawfulness of export and import rail rates it could not give consideration to ocean rates and transportation over which it has no jurisdiction for the holding of this Court in the *Import Rate Case,* 162 U. S. 197, cited in the first Koch report (R. 3503), that all circumstances and conditions, including the ocean haul, are to be taken into consideration in passing upon the issue of undue preference and prejudice as bearing upon such rate adjustments. The mere fact that the Commission has no jurisdiction over the water factor of the transportation does not in any sense eliminate or destroy the element of competition inherent in the traffic that affords legal justification for the maintenance of rates via one port or gateway on a parity with those via another.

(e) That the port of Galveston is now seeking to obtain a compulsory equalization with the inland port of Houston as to rates on export and import traffic.

Respectfully submitted,

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